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In The
Supreme Court of the United States

WILLIAM P. FORD, et al.,

Petitioners,

vs.

JOSE GUILLERMO GARCIA

and

CARLOS EUGENIO VIDES-CASANOVA,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE AND BRIEF OF AMICUS CURIAE THE CENTER FOR JUSTICE & ACCOUNTABILITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Pursuant to Rule 37.2 of the rules of this Court, the Center for Justice & Accountability respectfully moves this Court for leave to file the attached brief as Amicus Curiae in support of the Petition for Writ of Certiorari. This motion and brief has been served on all separately represented parties pursuant to Rule 29.3 of this Court, and proof of service filed with the Clerk. The Petitioners have orally consented. In a telephone conversation with the office of Kurt Klaus, counsel for the Respondent, his office indicated a consent to the filing of this Amicus Brief. Unfortunately, due to the fact that counsel for the Respondent is out of the country, the Center for Justice & Accountability was unable to obtain written consent.

For these reasons the Center for Justice & Accountability respectfully requests leave to file the attached brief as Amicus Curiae.

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BRIEF OF AMICUS CURIAE THE CENTER FOR JUSTICE & ACCOUNTABILITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE[1]

The Center for Justice & Accountability ("CJA") is a non-profit legal advocacy center that works to prevent torture and other severe human rights abuses around the world by helping survivors hold their perpetrators accountable. CJA brings civil lawsuits under the Alien Tort Claims Act and the Torture Victim Protection Act against perpetrators who live in or visit the United States, and has participated as an *amicus curiae* in several cases in order to strengthen the body of law relevant to our work. CJA's Board of Directors and Legal Advisory Council includes leading practitioners and academics in the field of international law and its application in U.S. courts. CJA served as co-counsel in *Romagoza, et al. v. Garcia, et al.*, a case against the same two generals who were the defendants in the instant case. In *Romagoza*, the jury found the generals liable under the command responsibility doctrine and ordered them to pay $54.6 million to the three plaintiffs, who had survived torture in El Salvador.

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[1] Pursuant to Rule 37.6, counsel for Amicus Curiae hereby states that this brief was authored in whole by counsel, and no other party made any monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

Review should be granted in this case to correct the mischief that will be caused by the erroneous addition of a proximate cause requirement to actions brought under the Torture Victims Protection Act of 1991 ("TVPA" or "the Act"). Review is also necessary to correct the equally erroneous imposition of a burden of persuasion upon torture victims with regard to disproving an element of a defense available to defendants under the Act.

These erroneous rulings threaten to undermine the usefulness of the TVPA in bringing to justice those who commit acts of torture and extrajudicial killing.

It is necessary for this Court to review and correct the erroneous addition of a proximate cause element to actions brought under the TVPA. There is no support or provision in the TVPA for the addition of such an element. The TVPA is, in part, a statutory extension of the Command Responsibility Doctrine which evolved from this Court's decision in *In Re Yamashita,* 327 U.S. 1 (1946). This same Command Responsibility Doctrine has become a part of customary international law. The Command Responsibility Doctrine, by its very nature, excludes the possibility of the defense of a lack of proximate cause.

Adding an element of proximate cause is unwarranted under domestic and international law. The addition of such an element would simply provide another layer of defense for those accused of torture and extrajudicial killing under the Act. It would also place an additional burden upon those torture victims seeking justice under the Act. This result is contrary to Congressional intent in the enactment of the TVPA, as well as international law.

It is also necessary for this Court to review and clarify the nature of the burden of persuasion under the TVPA. Placing the burden of persuasion upon torture victims and their families ignores the unique nature of the role of military commanders in having responsibility for the discipline and behavior of their units. The imposition of the burden also ignores the fact that these commanders have the first and best access to knowledge of steps they may have taken to exercise command and control over units accused of torture and extrajudicial killings.

This case provides this Court with an opportunity to correct and clarify the necessary proof and burdens for actions brought under the TVPA. By doing so the Court can ensure an accurate reading of its own *Yamashita* decision, and the Command Responsibility Doctrine developed from that decision.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO CORRECT THE ERRONEOUS ADDITION OF ELEMENTS TO AN ACTION UNDER THE TVPA THAT ARE INCONSISTENT WITH CONGRESSIONAL INTENT AND DOMESTIC AND INTERNATIONAL LAW.

On the fourth anniversary of the infamous attack on Pearl Harbor, this Court's *Yamashita* decision addressed whether the law of war imposes a duty on military commanders to take appropriate measures to prevent their troops from committing acts of brutality against noncombatants. The Court reasoned that since the entire purpose of the law of war was to protect civilian populations and prisoners of war, it was appropriate to prevent violations

of that law by reliance on military commanders who are responsible for their subordinates. *Yamashita* at 14-15. The Command Responsibility Doctrine which emerged from this holding applies criminal accountability to military and civilian leaders for unlawful acts committed by personnel under their charge if they knew, or should have known, of these acts and failed to prevent them or punish the perpetrators. The doctrine is premised on the view that superiors are in the best position to prevent the commission of atrocities by their subordinates. In his review of General Yamashita's conviction General MacArthur restated this duty: "The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international society." *Order of General Douglas MacArthur Confirming Death Sentence of General Tomoyuki Yamashita, February 6, 1946*, reprinted in Leon Friedman, *The Law of War, A Documentary History*, pp. 1598-1599 (1972).

The international legal community adopted and applied this principle in post-war International Military Tribunals conducted in Europe and the Far East. See *United States v. Wilhelm von Leeb* ("*High Command Case*"), *United Nations War Crimes Commission, XII Law Reports of Trials of War Criminals 1* (1948), *United States v. Wilhelm List* ("*Hostage Case*"), *United Nations War Crimes Commission, VIII Law Reports of Trials of War Criminals 34* (1948), *Tokyo Tribunal Cases*, *The Tokyo War Crimes Trials,* reprinted in Friedman at 1029-1031. See also *Prosecutor v. Delalic*, Judgment (Trial Chamber ICTY, Nov. 16, 1998) ¶¶338-363. International conventions have codified the doctrine, and expanded it to all individuals

exercising effective control over subordinates in international or internal armed conflicts. Several international tribunals (for Rwanda and the former Yugoslavia) and mixed domestic-international tribunals (e.g. for East Timor) have used the doctrine to impose individual criminal responsibility to those in command of units committing war crimes.

Because this Court first articulated the fundamentals of what has now become the Command Responsibility Doctrine, it is uniquely positioned in terms of authority, and responsibility, to address the troubling mutation of the doctrine in the case at bar. Neither the TVPA, nor expressions of the Command Responsibility Doctrine in international law, provide authority for the addition of the element of proximate cause as imposed in this case. Similarly, the imposition of a burden of persuasion upon torture victims suing under the TVPA is completely at odds with Congressional intent, and contradicts pronouncements of international law. For these reasons this case presents an opportunity for this Court to prune these erroneous and unwarranted additions from the requirements of the TVPA, and international law.

II. THE ERRONEOUS ADDITION OF "PROXIMATE CAUSE" AS A NECESSARY ELEMENT OF AN ACTION BROUGHT UNDER THE TVPA THREATENS TO UNDERMINE THE USEFULNESS OF THE STATUTE AND THE COMMAND RESPONSIBILITY DOCTRINE IN BRINGING WAR CRIMINALS TO JUSTICE UNDER DOMESTIC AND INTERNATIONAL LAW.

In this case the District Court Judge gave a jury instruction defining the three elements of the Command

Responsibility Doctrine, but then erroneously added a fourth element requiring a proximate cause link between the acts of the Generals, and the rape and murder of the churchwomen. The requirement of such a "proximate cause" element finds no support in the TVPA, or related international law.

The TVPA does not contain any specific language referring to proximate cause. The legislative history of the Act makes clear that the TVPA was articulating customary international law and the Command Responsibility Doctrine. The legislative history specifically states: "Responsibility for torture, summary execution or disappearance extends beyond the person or persons who actually committed the acts – anyone with higher authority who *authorized, tolerated, or knowingly ignored these facts*" S.Rep.No. 102-249 at 8 (1991) (emphasis added). This language is consistent with the Command Responsibility Doctrine, and it is obvious that the intent of Congress was to incorporate the Command Responsibility Doctrine into the TVPA. The decision below of the Eleventh Circuit recognized this. Pet.App. 8a.

As set forth in the Senate Report and U.S. case law, the Doctrine of Command Responsibility requires a plaintiff to prove three *and only three* elements: (a) the commander had a superior-subordinate relationship with the troops that committed the human rights abuses; (b) the commander knew, or should have known, that these troops were committing such offenses; and (c) the commander failed to prevent or repress the abuses. Once these three elements are met, a commander may be held criminally and civilly liable for the human rights violations committed by subordinates unless he presents affirmative defenses to overcome the presumption of liability. See Ilias

Bantekas, *The Contemporary Law of Superior Responsibility,* 93 Am. J.Int'l L. 573 (1999).

The decision of the Trial Judge to impose a proximate cause element also squarely conflicted with the only Circuit Court of Appeals decision to pass on the question. In *Hilao v. Estate of Marcos,* 103 F.3d 767 (9th Cir. 1996), the court approved of imposition of liability upon a foreign leader who directed, ordered, conspired with, or aided the military in torture, summary execution and disappearances, or had knowledge of that conduct and failed to use his power to prevent it. *Id.* at 776, 777.

Despite this authority, the Trial Judge added this proximate cause element, and in doing so set up an additional, unwarranted, defense for the Generals. This is not only contrary to the legislative history and intent of Congress in enacting the statute, but also important principles of international law regarding the Command Responsibility Doctrine, which holds military commanders responsible for the acts of their subordinates, although those commanders might not have been principals to the criminal acts. This is the fundamental tenet of the Command Responsibility Doctrine, and without it, not only torture victims, but other victims of war crimes, will be greatly impeded in bringing to justice those responsible for crimes against humanity.

This Court perhaps best explained the necessity and logic of this principle in its decision in *Yamashita*:

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its

> purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the *control of the operations of war by commanders who are to some extent responsible for their subordinates.*

Id. at 15 (Emphasis Added). *Yamashita* recognized, and the world has adopted as customary international law, that commanders must be responsible for the actions of their subordinates in order for society to have any control over military units and their compliance with humanitarian laws.

International law has also recognized that it is simply illogical and incompatible with the Command Responsibility Doctrine to have a proximate cause element. None of the international treaties setting forth the Command Responsibility Doctrine include a proximate cause element. None of the international or mixed domestic-international tribunals inject such a requirement. Perhaps the most compelling articulation of the reasoning rejecting proximate cause as an element is contained in an important international law precedent from the International Criminal Tribunal for the Former Yugoslavia. *Prosecutor v. Delalic, at* ¶¶396-400. The panel emphasized that the third prong of the Command Responsibility Doctrine – failure to punish – cannot logically share a causal connection with an underlying Act. "The very existence of the principle of superior responsibility for failure to punish . . . demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility." *Id.* at ¶ 400. With the addition of a proximate cause

element, a superior who learns of atrocities committed by his subordinates, and fails to discipline for these violations of the law of war would face individual criminal responsibility under international law, but escape civil liability in the United States because causation is lacking. The purposes of the TVPA could not be more ill served.

Beyond the conflict with the TVPA, authoritative precedent, and international law, the addition of a proximate cause element is fundamentally incompatible with the unique nature of military organizations, and the necessities of command responsibility that gave rise to the Command Responsibility Doctrine. It is a universal tenet of military organizations that a commanding officer is responsible for everything that his command does, or fails to do. *U.S. Department of Army Field Manual 101-5, Staff Organization and Operations 1-1* (May 1997). In such an organization the commander is ultimately responsible for the order and discipline of the unit, the training and competence of the force, and the welfare, morale, and conduct of the unit. *Id.;* Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility and Contemporary Military Operations,* 164 Mil.L.Rev. 155.

This concept of complete control and command places special responsibilities on the shoulders of a commanding officer to ensure that his unit complies with the dictates of law. In fact, society is entitled to the assurance that the commanding officer will do so:

> The military is a unique society where the commander has tremendous authority over subordinates not normally extended to superiors in the civilian sector. Coupled with significant lawful control over the troops is the commander's stewardship over a unit's tremendously awesome

> destructive capabilities. Mankind must, therefore, rely on commanders to use their authority to control both the military force's organic capacity for destruction and the conduct of their subordinates. Commanders have both a moral and legal role in preventing atrocities that could potentially be committed by subordinates against non-combatants . . .

Id. at 166.

In this unique context of a military organization it is fanciful to talk of proximate cause as being a necessary element of an action against a commander of a unit perpetrating war crimes. The military commander expects rightly to have the absolute obedience of troops under his command. If the order is given, it is fully expected that it will be carried out. By the same token, if a commanding officer seeks to control unlawful actions by his subordinates, it is fully expected that this will be effective. To inject a proximate cause requirement into a TVPA action against a military commander is to ignore this fundamental principle of the nature of military organizations. Those who fail to carry out their responsibility to control the military organizations entrusted to them should not have the benefit of being able to argue that, like some civilian organization, they had no hand in the proximate cause of the actions of their subordinates.

Yamashita, and the subsequent development of the Command Responsibility Doctrine in international law, is of little value to the legal community, and the world at large, if proximate cause is a necessary element. In fact, even General Yamashita may not have been held accountable under the Trial Judge's instruction. Few Filipinos brutalized by Japanese troops could have shown a direct

causal connection between the omissions of General Yamashita, and their individual torture or extrajudicial killings. That the addition of proximate cause to the Command Responsibility Doctrine would likely negate the result in *Yamashita* shows the error of imposing that additional element. Adding a proximate cause element greatly undermines the utility of the Command Responsibility Doctrine and the usefulness of the TVPA as a method of bringing war criminals to justice.

III. PLACING THE BURDEN OF PERSUASION ON THE VICTIMS OF TORTURE IN ACTIONS BROUGHT UNDER THE TVPA IS CONTRARY TO CONGRESSIONAL INTENT, ANALOGOUS CIVIL LAW AND INTERNATIONAL LAW.

Allocation of the burden of persuasion in civil cases arising under the TVPA is a matter of first impression. The Trial Judge considered *Yamashita*, and the judgments of international tribunals, and concluded that a showing of "effective" control over guilty troops is a prima facie requirement before liability will be imposed under the Command Responsibility Doctrine. As a result, the Eleventh Circuit did not find plain error in a jury instruction which placed the burden of production and persuasion on plaintiffs. The Court of Appeals noted that they could find no international judgments which shifted the ultimate burden of persuasion away from the plaintiffs, and felt the law is at best uncertain on this point. Pet.App. 14a.

This analysis overlooks a critical distinction: *Yamashita* and the international judgments referenced were criminal tribunals. International criminal tribunals place the burden of proof on the prosecutor because of the grave

penalties and consequences at stake. This is in sharp contrast with the case at bar, and actions under the TVPA.

The TVPA is a civil statute, albeit aimed at heinous criminal behavior. Rather than looking to criminal law for guidance, Congress instructed that the scope of liability under the TVPA should be derived from interpretations of actual or apparent authority set forth in agency theory. The analysis under agency law hinges on whether a third party reasonably believes an agent continues to act with authority, and includes the possibility of lingering apparent authority even after the termination of actual authority. (See *Restatement (Third) of Agency* §202, §203 and *§311* (T. D. No. 2, 2001); *§ 3.11 Comment (c).* Notably, in some cases a principal's death or loss of capacity does not by itself end apparent authority. *Schlock v. United States,* 56 F. Supp. 2d 185, 193 (D. R. I. 1999.).

Comparisons between the role of business employers and military superiors in civil actions are illuminative. Both exercise an unusual amount of control over those they employ and lead, and can reasonably anticipate that certain types of unlawful acts might be committed by those under their responsibility. Employers and commanders have the ability to impose direct forms of sanctions to deter illegal behavior. Employers and commanders are also in a better position to shoulder the burden of proving that adequate measures were instituted to avoid the harm which ensued. If this Court places elevated responsibility upon employers, military commanders warrant even heavier burdens because of their unique command role.

A weighing of the equities also would require placing the burden of persuasion on commanders, given that they are in a far stronger position to prove their lack of effective

control than are plaintiffs to prove the converse. Plaintiffs in TVPA actions are disadvantaged at every turn. Torture and extrajudicial killings generally occur in remote locations, hidden from all scrutiny, and often go undiscovered for substantial periods. Appropriate and timely investigations into such atrocities are unlikely. Moreover, owing to claims of national security, civilians can rarely gain access to the information needed to establish effective command; e.g., charts showing the chain of command; statements of the responsibilities of various officers; rules of engagement; policies regarding permissible interrogation techniques; records regarding complaints of torture and what was done with them; and internal assessments of what the impact would be if torturers were punished. Absent access to such documents, plaintiffs must rely upon finding inside witnesses who are willing to step forward to testify against their superiors or colleagues. Such inside witnesses have on occasion stepped forward, and, on occasion, such as under the military dictatorships that ruled El Salvador at the time of the murders at issue, were killed or suffered other retaliation.

Placing the burden of persuasion on torture victims, or their personal representatives, is not consistent with the legislative history of the TVPA, is not mandated by its terms, and favors those the law sought to make accountable. In another telling consideration, it is unclear whether General Yamashita would have been criminally accountable if the burden of persuasion had been on the allied powers to show he exercised "effective" control over his subordinates. It would have been difficult, if not impossible, for prosecutors to piece together and prove the state of the Japanese command and control structure in

the last days before Japanese surrender. Instead, Yamashita quite rightly raised his lack of effective control as an affirmative defense and attempted to sustain it through proof. The Generals in this case should properly have had to make out this defense in the same way.

CONCLUSION

In *Yamashita,* this Court defined when a commander may be held criminally responsible for the acts of subordinates. That ruling was the foundation for the Command Responsibility Doctrine which has gained the status of customary international law. Congress incorporated that doctrine in the TVPA, and victims of torture now rely on it in civil courts to gain some measure of accountability from their torturers. By inserting a proximate cause requirement, and placing the burden of persuasion on the victims of torture, the decision below threatens to undermine the usefulness of the TVPA and reverse great strides in humanitarian law. Four American churchwomen were kidnapped, raped and murdered in El Salvador. Their quest for justice continues through their representatives more than two decades later. This Court should accept this case, clarify the causal and burden allocations of the TVPA, and in so doing take another small step in the struggle to put an end to the impunity of commanders who

authorize, tolerate, or ignore the commission of flagrant human rights violations.

Respectfully submitted,

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